

ATTACHMENT E

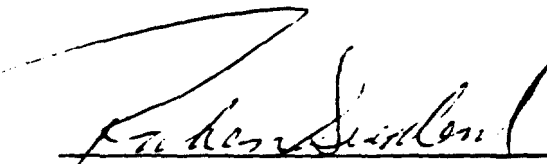
DECLARATION OF  
ROBERT W. SUDBRINK

# DECLARATION

I, Robert W. Sudbrink, hereby state as follows:

1. I am President of TV-14, Inc., licensee of television station WTLK, Channel 14, Rome, GA.

2. I have reviewed the attached letter concerning the plight of Channel 14 in its effort to survive faced with direct competition from the Atlanta television stations. I hereby declare that I am familiar with the facts presented therein and that they are true and correct to the best of my knowledge.



Robert W. Sudbrink, President  
TV-14, Inc.

ATTACHMENT 2

FCC Public Notice and Memorandum Opinion  
And Order, 6 FCC Rcd. 7324 (1991)



# NEWS

FEDERAL COMMUNICATIONS COMMISSION  
1919 M STREET, N.W.  
WASHINGTON, D.C. 20554

News media information 202 / 632-5050  
Recorded listing of releases and texts  
202 / 632-0002

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This is an unofficial announcement of Commission action. Release of the full text of a Commission order constitutes official action. See MCI v. FCC, 515 F.2d 365 (D.C. Cir. 1974).

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Report No. MM-591

MASS MEDIA ACTION

December 3, 1991

## WTLK, CHANNEL 14, ROME, GA, NOW INCLUDED IN THE ATLANTA, GA, TELEVISION MARKET

The Commission has granted a request for a ruling by TV 14, Inc., licensee of television station WTLK, Channel 14, Rome, GA, that it be included in the Atlanta, GA, television market.

FCC rules preclude television stations from acquiring nonnetwork programming exclusivity against stations licensed to communities more than 35 miles in distance, that are not part of the same television market. This rule was designed to assist stations in "overshadowed" markets by making more programming available to them. Rome, GA, is 56 miles from Atlanta, and under Commission rules, is not defined as part of the Atlanta market.

WTLK requested either a declaratory ruling or a waiver of the rules, thus permitting it to compete for exclusivity within the market. WTLK's principal community contour is over Atlanta and its Grade B contour signal is over much of the Atlanta market area.

In the case involving Press Television Corp., the Commission stated that requests for relief from the territorial exclusivity rule are ordinarily best addressed through a rulemaking process, and reiterated that it did not intend to follow the concept of determining the applicability of the rule on a case-by-case basis. However, the Commission noted that it would be counterproductive to apply a rule intended to assist a station to compete and serve the public in a way that actually hindered that ability. The Commission concluded therefore, that it would not withhold action pending a broader review of all markets now being considered in the outstanding proceeding in Docket 87-24. Since the Press case and this proceeding involving WTLK appear similar, it would also act in this instance.

Given the degree of service area overlap between WTLK and the stations in Atlanta, the Commission concluded that the stations in these two communities were clearly competitive and should be permitted to purchase exclusive program rights against each other. It further concluded, that to risk the demise of the station while awaiting the outcome of Docket 87-24 would not be in the public interest. Accordingly, the Commission granted WTLK's request.

Action by the Commission December 2, 1991, by Memorandum Opinion and Order (FCC 91-393). Commissioners Sikes (Chairman), Quello, Marshall, Barrett, and Duggan.

-FCC-

News Media contact: Patricia A. Chew at (202) 632-5050.  
Mass Media Bureau contact: William Johnson at (202) 632-6460.

Before the  
Federal Communications Commission  
Washington, D.C. 20554

In the Matter of:

Request by TV 14, Inc.                      MMB File No. 901214A  
for Declaratory Ruling/Waiver of  
Section 73.658(m) of the Commission's  
Rules with Respect to Inclusion of  
Station WTLK(TV), Rome, Georgia in the  
Atlanta, Georgia Television Market

**MEMORANDUM OPINION AND ORDER**

Adopted: December 2, 1991; Released: December 10, 1991

By the Commission:

1. TV 14, Inc., licensee of WTLK(TV), (independent), channel 14, Rome, Georgia has requested a ruling that WTLK(TV) is a station in the Atlanta, Georgia television market for purposes of Section 73.658(m) of our rules.

2. Public notice of this request was given by the Commission on October 6, 1991 and responsive pleadings were filed by four parties, all of whom are Atlanta, Georgia television station licensees: Channel 36 Licensee Corp., licensee of WATL(TV), channel 36; Georgia Television Company, licensee of WSBTV, channel 2; Pacific and Southern Company, Inc., licensee of WXIA-TV, channel 11; and WGNX Inc., licensee of station WGNX(TV), channel 46.

**BACKGROUND**

3. Section 73.658(m) of the Commission's rules generally permits a television station to buy exclusive rights in nonnetwork programming only against other television stations in the same market and against stations no more than 35 miles distant. The rule has as its intended purpose facilitating the acquisition of programming by stations in "overshadowed" markets.<sup>1</sup> The rule states, in relevant part:

No television station shall enter into any contract, arrangement, or understanding, expressed or implied; with a non-network program producer, distributor, or supplier, or other person; which prevents or hinders another television station located in a community over 56.3 kilometers (35 miles) away ... from broadcasting any program purchased by the former station from such non-network program producer, distributor, supplier, or other person, except that a television station may secure exclusivity against a television station licensed to another des-

igned community in a hyphenated market specified in the market listing as contained in Section 76.51 of this chapter ....

**REQUEST AND ARGUMENT**

4. Petitioner asks that the Commission act, as it did in *Press Television Corp.*, *supra*,<sup>2</sup> through waiver or declaratory ruling, and hold that station WTLK is a station in the Atlanta, Georgia television market and that stations in Atlanta are entitled to acquire programming exclusivity against it and vice versa. In support of this request, it advances essentially seven points:

-- That its station, based on the objective facts of the market, is already part of and competitive with Atlanta stations; that it places a city grade contour signal over Atlanta and a grade B contour over the vast majority of the 60 counties in the Atlanta television market area; and that it faces grade B coverage and cable television carriage of the Atlanta stations in Rome.

-- That it is already generally recognized to be a station in the market as reflected by the fact that the news media include WTLK in their Atlanta-station program listing and the rating services, on whom advertisers depend, include Rome in the Atlanta market designation (with a parenthetical reference).

-- That grant of its request is consistent with the objective of the rule in question, which was intended to assist the survival and growth of "overshadowed" stations.

-- That because it is a new station, in financial distress, proposing a unique 24-hour per day all-talk format with locally produced public affairs programming at the heart of its programming efforts, it is entitled to special consideration from the Commission and to have its request acted on without the necessity of awaiting a more lengthy review of issues about other markets in the rulemaking process.

-- That grant of the request will actually be of potential benefit to the stations in Atlanta by permitting them to negotiate for program exclusivity against a station which is competitive in their market area.

-- That the situation presented is sufficiently similar to that in *Press Television Corp.*, *supra*, that comparable action is compelled.

-- And, finally, that the Commission need have no concern with an avalanche of similar requests if its action is limited to situations where the station intended to be protected by the rules is seeking to have that protection waived.

5. None of the parties responding to this request dispute the contention that WTLK(TV) is a competitive station in the Atlanta market as a matter of fact. WGNX Inc., for

<sup>1</sup> See *Press Television Corp.*, 4 FCC Rcd 8799, 8800-01 (1989), *aff'd on recon.*, 6 FCC Rcd 6563 (1991); *Ralph C. Wilson Industries, Inc.*, 91 FCC 2d 127, 137-8 (1982).

<sup>2</sup> In that case, the Commission included a station in Clermont,

Florida as a local station in the Orlando-Daytona Beach-Melbourne-Cocoa market for purposes of Section 73.658(m) after concluding that the station in Clermont was unavoidably competitive with other stations in that market.

example, notes that WTLK directs its programming, through the location of its transmission facilities, to viewers in metropolitan Atlanta and that the stations in Rome and Atlanta should be entitled to purchase program exclusivity against each other. All of the responding parties argue, however, that the matters raised should be addressed through the *Further Notice of Proposed Rulemaking in Docket 87-24*, 3 FCC Rcd 6171 (1988) (reviewing the scope of exclusivity under the territorial and cable television exclusivity rules and reviewing the market designations used for purposes of these rules). They deny that this is the kind of unambiguous case presented in *Press Television Corp.* In this regard, the Commission's attention is drawn to the fact that Clermont, the city of license in the *Press* case, was within 35 miles of Orlando, one of the named communities in that market, whereas Rome is some 56 miles from Atlanta and WTLK's station facilities are not colocated with those of any Atlanta station. Rather than presenting the same facts and equities as the *Press* case, it is argued, the situation is indistinguishable from the situations of innumerable stations in "overshadowed" markets. It is urged that the undocumented claims of financial distress do not warrant grant of the relief requested.

6. Finally, Georgia Television notes that, if the relief requested is granted, WSB-TV would be prevented from enforcing exclusivity against WTLK for programs already under contract. Both WSB-TV and WTLK(TV), it notes, already have the rights to broadcast "Donahue." If the request is granted, it asks that the Commission permit renegotiation of existing program contracts.

#### DISCUSSION

7. In *Press Television Corp.*, *supra*, we stated that requests for relief from the territorial exclusivity rule are "ordinarily best addressed through a Rule Making process" and reiterated that we did not intend to follow "the concept of determining the applicability of the ... rule on a case-by-case basis." 4 FCC Rcd at 8801. Nevertheless, we noted that it would be anomalous to apply a rule intended to assist a station to compete and serve the public in a way that actually hindered that ability. Thus, following the thrust of the court's decision in *WAIT Radio v. FCC*, 418 F.2d 1153 (D.C. Cir. 1969), we indicated that we would not decline to act during the pendency of the outstanding Docket 87-24 rulemaking "[w]here there is a factual pattern as unambiguous as that here and the rule appears to be functioning in conflict with its intended purpose." *Id.*

8. We believe that the situation presented by WTLK(TV) here fits the pattern described in *Press* and that similar action is warranted. In *Press*, we found that the station at issue was "unavoidably competitive" with other stations in the market against whom it wanted to acquire exclusivity. We further found that the station, an independent UHF facility licensed to a community on the fringe of the market, was the very type of station the Commission intended to protect when adopting the territorial exclusivity rule in the first instance. Under these circumstances, we concluded that the public interest would best be served by waiving the restrictions of Section 73.658(m) to enable the station to assert nonnetwork program exclusivity against its actual competitors.

9. Similarly, in this case, there is no dispute presented as to the factual situation that exists in the market. WTLK and the stations in Atlanta have coverage areas that substantially overlap and the stations in fact compete for audience throughout most of the Atlanta market area. Although the transmitters of the Atlanta and Rome stations are not on the same tower, as were those of the Clermont and Daytona Beach stations in *Press*, the competitiveness of the stations is clearly evidenced by the extent of their overlapping service areas. Moreover, as we noted in *Press*, Section 73.658(m) of the rules was adopted to assure that excessive contractual exclusivity was not unreasonably depriving some stations, particularly independent UHF stations and the public served by them, of valuable programming. The rule clearly reflects the Commission's intention to permit stations servicing the same market area with competing facilities to acquire exclusivity against each other. At the same time, the rule was intended to assist new UHF independent stations operating in "fringe" areas to acquire programming. *First Report and Order in Docket 18179*, 42 FCC 2d 175 (1973), *reconsideration granted in part*, 46 FCC 2d 892 (1974). "The stations which the rule was intended to protect," as the Commission has stated, "are overshadowed stations, with a limited overlap and a limited capacity to compete with the larger station." *Ralph C. Wilson Industries, Inc.*, 91 FCC 2d 127, 137-8 (1982). Since the station seeking the waiver in this case is the very type of facility that was meant to benefit from our territorial exclusivity restrictions, it would be entirely inconsistent with the intent and thrust of the rule, as it would have been in *Press*, to deny the relief requested by WTLK(TV).

10. While we continue to believe that less clear-cut cases should be resolved through a more general rulemaking process, we clearly have the authority to address situations such as this through the waiver process: "The agency's discretion to proceed in difficult areas through general rules is intimately tied to the existence of a safety valve procedure for consideration of an application for exemption based on special circumstances." *WAIT Radio v. FCC*, 418 F.2d at 1157. It would be counterproductive to put this station at risk by awaiting the completion of the pending rulemaking and our actions here and in *Press* -- both of which deal with unique and limited sets of facts -- in no way prejudice the resolution of the much broader issues raised in that proceeding. Finally, we see no reason why special treatment is necessary to account for existing contractual arrangements. Nothing in the rules or in this ruling would preclude the renegotiation of existing contracts.

11. Accordingly, IT IS ORDERED, That the request filed December 14, 1990 by TV 14, Inc. IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy  
Secretary

**ATTACHMENT 3**

**WTLK's January 15, 1992 Request of the Copyright  
Office For Declaratory Ruling**

LAW OFFICES  
**HALEY, BADER & POTTS**

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RICHARD H. STRODEL  
JAMES M. TOWARNICKY  
KATHLEEN VICTORY  
MELODIE A. VIRTUE

LARRY D. SUMMERVILLE  
BROADCAST ANALYST

ANDREW G. HALEY  
(1904-1966)

MICHAEL H. BADER  
WILLIAM J. BYRNES  
JOHN CRIGLER  
JAMES E. DUNSTAN  
JOHN WELLS KING  
THEODORE D. KRAMER  
BENJAMIN J. LAMBIOTTE  
MARY A. McREYNOLDS  
DAVID G. O'NEIL  
JOHN M. PELKEY

KENNETH A. COX  
MARY PRICE TAYLOR  
COUNSEL

**January 15, 1992**

**By Hand**

Dorothy Schrader, Esq.  
General Counsel  
U.S. Copyright Office  
Library of Congress  
Washington, D.C. 20540

re: TV 14, Inc.,  
Rome-Atlanta, Georgia  
Request for Ruling

Dear Ms. Schrader:

Michael Bader and I appreciate you and Patricia Sinn meeting with us on Monday, January 13, 1992, to discuss the unique situation of our client, TV 14, Inc., licensee of television station WTLK. By this letter, we formally request an opinion letter by the Copyright Office concerning the copyright status of WTLK on Atlanta-area cable systems.

**Background**

WTLK (formerly WAWA), Channel 14, began operations in 1988. It was originally licensed to Rome, Georgia. Rome is located within the Atlanta, Georgia Area of Dominant Influence ("ADI," No. 12), some 56 miles from Atlanta. From its inception, WTLK has been forced to compete directly with the Atlanta television stations, since most Atlanta stations place a Grade B signal over Rome, and the Rome cable system carries six Atlanta television stations as local signals. In early 1990, WTLK received permission from the FCC to relocate its transmission facilities closer to Atlanta and to increase substantially its power to allow it to cover Atlanta with a City Grade signal.<sup>1/</sup> Appended hereto as

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<sup>1/</sup> The terms "Grade B signal," "Grade A signal," and "City Grade signal," are all FCC terms relating to the strength of a television signal from its transmission point. 47 C.F.R. § 73.683. The City Grade contour is the strongest, and is the minimum signal strength which must be placed over a station's city of license. The Grade A contour extends

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January 15, 1992  
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Attachment 1 is a map showing the Grade B coverage contours of the Atlanta stations as well as the WTLK facility. WTLK commenced operations from those facilities in late 1990. Syndicators began demanding that WTLK pay Atlanta rates for programming, rather than the substantially lower rates applicable to a smaller Rome television market. Arbitron also began designating the market as "Atlanta (Rome)."

On December 14, 1990, WTLK requested a ruling from the FCC that it is a local station in the Atlanta area. Appended hereto as Attachment 2 is a copy of that request. Therein, WTLK noted the inequity of the situation, and highlighted the fact that viewers in Atlanta would be denied access to the highly innovative and minority-oriented programming of the station if the FCC did not rule that WTLK was local in Atlanta. Appended as Attachment 3 are copies of letters of support from minority and other public interest groups which were filed with the FCC.

On December 3, 1991, the FCC released a Public Notice granting WTLK's request, stating:

The Commission has granted a request for a ruling by TV 14, Inc., licensee of television station WTLK, Channel 14, Rome, GA, that it be included in the Atlanta, GA, television market.

On December 10, 1991, the FCC released the full text of its Memorandum Opinion and Order ("MO&O") granting WTLK's request. Appended hereto as Attachment 4 is a copy of the Public Notice and Memorandum Opinion and Order.

In response to this ruling, a number of Atlanta-area cable systems are not comfortable with claiming WTLK as a local signal for purposes of the compulsory copyright license under 17 U.S.C. § 111. Specifically, some have pointed to the fact that even though the FCC found that WTLK was "unavoidably competitive" in Atlanta, the FCC did not formally amend Section 76.51 of the FCC's rules to re-hyphenate the Atlanta market. Without this, some cable systems contend, there is a question as to whether WTLK can be considered local for Atlanta cable systems.

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beyond the City Grade Contour, and the Grade B contour (equal to between 47 and 64 dBu depending on the channel number), extends still further, and is generally considered to represent the edge of the area of reliable service area of a station.

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January 15, 1992  
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The FCC no Longer has Reason to Re-hyphenate the Major  
Television Markets Contained in Section 76.51

The FCC's silence on the impact of its decision on cable carriage issues is understandable, in that the FCC no longer has any jurisdiction over the carriage of television stations by cable systems. Rather, the ability to demand carriage ("must-carry") was eliminated by court decision, and the fees to be paid by cable systems are governed by rules implementing the Cable Compulsory license under 17 U.S.C. §111, administered by the Copyright Royalty Tribunal and interpreted by the Copyright Office.

Thus, for the FCC to make no finding as to the copyright status of WTLK should not be surprising. Moreover, the fact that the FCC failed to formally amend Section 76.51 of its rules (the only remnant left of the old must-carry rules) to rename the Atlanta market "Atlanta-Rome," likewise should not be surprising. The FCC has not amended Section 76.51 since the must-carry rules were last struck down in Century Communications Corp. v. FCC, 835 F.2d 292 (D.C. Cir. 1987), because, with the core must-carry rules eliminated, there has been no need to modify a peripheral rule which serves no further purpose. See 47 C.F.R. § 76.51 ("For the purposes of the cable television rules, the following is a list of the major television markets and their designated communities").

Most recently, the FCC has refused to interpret its former market quota rules, finding that the request boiled down to a copyright issue, not a communications issue, and therefore, the request should be made to the Copyright Office for relief. A copy of the Public Notice of that decision is appended hereto as Attachment 5.

The FCC's ruling makes clear, nonetheless, that WTLK should be treated as a local station for cable carriage as well as for program exclusivity purposes. As the language above explains, WTLK is unavoidably competitive with the Atlanta stations. TV 14 demonstrated that it places a City Grade signal over Atlanta and a Grade B signal over almost the entire ADI. Moreover, the ratings services already consider Rome to be part of the Atlanta market, as they now designate the market as "Atlanta (Rome)." The Atlanta newspapers list the programming of WTLK along with the programming of other Atlanta stations.

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**Formal Re-hyphenation of Section 76.51 is not Necessary for WTLK to be Considered Local for Copyright Purposes**

In its role as interpreter of Section 111, the Copyright Office in the past has been hesitant to invade the jurisdiction of the FCC, or place itself "in the shoes" of the FCC in interpreting former FCC rules. Nevertheless, in a Policy Decision, issued July 29, 1987, the Copyright Office concluded that "signals entitled to mandatory carriage status under the FCC's former must carry rules as a result of an FCC market redesignation order are to be treated as local signals for purposes of the cable compulsory license." 52 Fed. Reg. 28,362, 28,366 (July 29, 1987).

Formal re-hyphenation, however, is not necessary to reach this conclusion, where here, the FCC has issued an order finding WTLK to be local for programming purposes in the Atlanta market. In adopting Section 111 of the Copyright Act in 1976, did not mean to freeze forever the definition of local and distant stations. Indeed, in the House Report which accompanied the passage of Section 111, Congress indicated that:

Under FCC rules and regulations this so-called "must carry" areas is defined based on the market size and position of cable systems in 47 C.F.R. 76.57 [rules applicable to systems outside all television markets], 76.59 [rules applicable to systems in smaller television markets], 76.61 [rules applicable to systems in top 50 markets], and 76.63 [rules applicable to systems in second 50 markets].

H.R. Rep. No. 1496, 94th Cong. 2d Sess. 99 (September 3, 1976). These are the FCC rules which were "frozen" for purposes of the compulsory license. Other rules which impact these rules are open to interpretation to reflect changes in the television environment. As the Copyright Office noted, changes in the list of significantly viewed stations, pursuant 47 C.F.R. §76.54, and formal changes in the top 100 markets, pursuant to 47 C.F.R. §76.51, can change those definitions. 52 Fed. Reg. 28,362.

The case presented here is exactly the same. The FCC has determined that WTLK is local to Atlanta, and has interpreted Section 73.658(m) to allow WTLK to purchase exclusivity against Atlanta stations and vice versa. Section 73.658(m) has a direct impact on the old must-carry

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January 15, 1992  
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rules in the same manner as either Section 76.51 or Section 76.54 has, since it is to Section 76.658(m) which the Copyright Office must turn to find authority for allowing the determination of below-100 hyphenated television markets to be made by the ratings services. Given this, the Copyright Office should affirm the FCC's conclusion as to the local nature of WTLK in Atlanta, and allow Atlanta area cable systems to carry the signal on a local basis.

**Copyright Holders are Already Receiving Full Compensation for Their Product in the Atlanta Market**

The Section 111 compulsory license is based on the notion that copyright owners should be compensated for the retransmission of their product, where such retransmission is outside the area to which the copyright owner has licensed the property for broadcast. Hence, the regulations implementing Section 111 require cable systems to pay fees based on the importation of programming from other markets into a market where it could damage a copyright owner's ability to sell the programming in that market. See H.R. Rep. 1476, 94th Congress, pp. 88-91 (reprinted in 1976 U.S. Code Cong. & Admin. News, pp. 5704-5705 ("House Report")). Yet in the present case, the FCC has determined that WTLK is local for programming purposes in Atlanta, and has allowed copyright owners to grant WTLK the right to purchase and enforce exclusivity against Atlanta stations -- all at Atlanta prices.

The fact that copyright owners are charging WTLK Atlanta and not Rome rates for programming purchased by WTLK means that those copyright holders are already receiving full compensation for the distribution of their product in Atlanta. The carriage of WTLK on Atlanta cable systems as a local station thus does not diminish the value of their product. Indeed, this situation is far different from the types of situations Congress intended to be covered by the compulsory license. Section 111 was adopted to provide copyright holders with additional compensation when their programming was taken from market for which it was paid, into another market. WTLK has already paid for the right to distribute the programming in the Atlanta market.

To allow copyright holders to obtain additional compensation by virtue of a finding that WTLK is not local in Atlanta and forcing cable systems to pay additional royalty fees under the compulsory license, would be tantamount to granting copyright holders a windfall for their product. Compare "House Report", supra, with Tele-

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January 15, 1992  
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prompter Corp. v. Columbia Broadcasting Systems, Inc., 415 U.S. 394, 411-13 (1968) (retransmission of local television stations by cable systems does not harm copyright holders). The Copyright Office confirmed this finding in 1987, concluding:

Congress distinguished local from distant signals for purposes of copyright royalty calculation because it determined that cable carriage of broadcast television programming within station's local market has no impact on the ability of the copyright owner to exploit the retransmitted works in a distant market, and therefore poses no threat to copyright owners.

52 Fed. Reg. 28,362, 28,364 (July 29, 1987) (emphasis added).

A conclusion that WTLK is not local for cable carriage purposes leads to the additional nonsensical situation where WTLK can keep other Atlanta stations from showing a program, but itself can't be seen by Atlanta citizens because it is not carried on the cable system, because it is not local. Clearly, Congress never intended such a result when it enacted Section 111 of the Copyright Act. Rather, it relied on the FCC and the Copyright Office to respect the "intricate and complicated interplay" between their respective jurisdictions. 1976 U.S. Code Cong. & Ad. News, at 5703. For the Copyright Office to ignore the interplay between Part 73 and Part 76 of the FCC's rules would violate this congressional admonition.

The Situation Presented Here is Far Different From that Presented the Copyright Office Concerning a Clermont, Florida Television Station

We are aware that the Copyright Office has issued an advisory letter concerning a situation involving a Clermont, Florida television station and whether it is a local signal for a Melbourne, Florida cable system, nearly 80 miles away.

In that case, WKCF, the Clermont station, did not even place a Grade B signal over the cable system. Located some 25 miles west of the western-most designated city in a multi-city hyphenated market, viewers simply could not receive the Clermont signal in Melbourne. In direct contrast, WTLK places a City Grade signal over Atlanta, and a Grade B signal over almost the entire ADI. There is no question but that the signal can be received throughout the Atlanta area.

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January 15, 1992  
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Further, in the Clermont case, the Copyright Office was dealing with a hyphenated market (Orlando-Daytona Beach-Melbourne-Cocoa) already containing four cities spread throughout central Florida. Thus, Clermont was attempting to extend its reach not into just one larger area (Orlando), but to a number of additional designated cities, all 50 or more miles away. To our understanding, even after Press Broadcasting (licensee of the Clermont station) received a waiver from the FCC of its programming rules to allow it to buy exclusivity against other stations in the market, the rating services have never included Clermont in the market, even on a parenthetical basis. In contrast, Rome is considered part of the Atlanta market by the rating services designating the market "Atlanta(Rome)." This distinction is critical, in that the Copyright Office looks to the market designation as defined by the ratings services below the top 100 markets, pursuant to 47 C.F.R. § 73.658(m).

A Finding that WTLK is Local in Atlanta for Cable Copyright Will not Result in a Wave of Similar Requests

The situation presented by WTLK is truly unique. If Atlanta were a smaller television market, WTLK would be local both by virtue of the signal it places over Atlanta, and the fact that the rating services now consider Rome to be part of the Atlanta market. It is only because Atlanta is a non-hyphenated top 100 market that the present interpretation is even needed. In light of the fact that the FCC has issued only two rulings under Section 73.658(m) modifying the local status of stations, it is highly unlikely that a favorable Copyright Office ruling will result in drastic changes to the compulsory license scheme. For the same reasons cited in 1987, the Copyright Office can feel confident that it is dealing with a truly unique situation in this case.

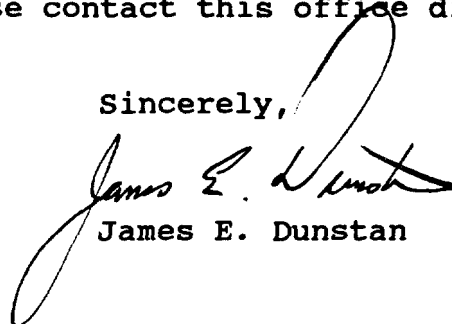
Conclusion

The FCC has declared WTLK to be local in the Atlanta market to the full extent of its jurisdiction. WTLK is now free to buy exclusive program and cable exclusivity throughout its 35 mile zone and into Atlanta. Based on this, we conclude that WTLK also should be deemed local for cable carriage purposes, given that the FCC still maintained jurisdiction over cable carriage matters, it would have declared WTLK local in Atlanta for cable carriage.

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Thank you for your attention in this matter. If you have any questions, please contact this office directly.

Sincerely,

A handwritten signature in cursive script, appearing to read "James E. Dunstan". The signature is written in dark ink and is positioned above the printed name.

James E. Dunstan

Enclosures

cc: Patricia Sinn

**ATTACHMENT 4**

**Copyright Office May 15, 1992, Response Letter**

May 15, 1992



James E. Dunstan, Esquire  
Haley, Bader & Potts  
Suite 600  
2000 M Street, N.W.  
Washington, D.C. 20036-3374

Dear Mr. Dunstan:

LIBRARY  
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CONGRESS

This is in response to your letter of January 15, 1992, and your January 13, 1992, meeting with Michael Bader, Patricia Sinn, and me, regarding television broadcast station WTLK, Rome, Georgia.

The facts in your case are as follows. WTLK is licensed by the Federal Communications Commission to Rome, Georgia, which is located within the Atlanta, Georgia, Area of Dominant Influence (ADI). In 1990, WTLK received permission from the FCC to relocate transmission facilities, allowing it to cover Atlanta with a city grade signal. This change was made. In addition, you state that Arbitron rating service has begun designating the Atlanta market as "Atlanta (Rome)."

Washington  
D C  
20554

In December, 1990, WTLK asked the FCC to rule that it is a local station in the Atlanta area for exclusivity purposes, and asked for waiver of section 73.658(m) of its rules. The request was granted in December, 1991. The Commission did not amend its rules to re-hyphenate the Atlanta market, because with the elimination of the must-carry provisions, the FCC makes no changes regarding the television market list.

You state that some Atlanta area cable systems will not carry WTLK because, under the terms of 17 U.S.C. §111, they assert WTLK is not considered a local signal. Thus, you say that although syndicators demand that WTKL pay Atlanta rates for programming because it is competitive with Atlanta area stations, cable systems in the area see WTLK as a distant signal for copyright purposes requiring payment of distant signal fees under the compulsory license system.

You argue that because WTLK is being charged prices comparable to those charged Atlanta stations, there is no need to further compensate copyright owners by insisting that the distant signal carriage fees of 17 U.S.C. §111 be paid. You also say that WTLK is essentially a local station, and not the type Congress intended to be subject to the distant signal compulsory license fees.

You attempt to distinguish WTLK's situation from that of WKCT, Clermont, Florida, a television station that recently petitioned the Copyright Office (unsuccessfully) for declaration that it is a local station for a Melbourne, Florida, cable system. You argue that WKCT did not place even a grade B signal over Melbourne, whereas WTLK places a city-grade signal over Atlanta. Moreover, you point out that ratings services do not consider Clermont to be in the Orlando-Daytona Beach-Melbourne-Cocoa market, whereas Arbitron does include Rome in the Atlanta market.

As you know, the Copyright Office does not engage in market designations or issue declarations placing particular broadcasters within certain markets. The Office notes that you have offered several good equitable arguments as to why WTLK should be considered a local signal throughout the Atlanta market. Were the FCC still updating its major market list, it is very likely that Rome would be added as part of the Atlanta market. Economic realities indicate that WTLK is a true competitor in the marketplace, and deserves to be considered on equal footing with other stations currently operating in the hyphenated market. But while marketplace concerns and communications issues may ultimately have a bearing in a court of law as to the adequate and proper compensation due copyright owners for retransmission of their works, they do not affect the administrative task of the Copyright Office in applying the terms of the cable compulsory license.

The Copyright Office must apply the terms of 17 U.S.C. §111 as the statute is written. The "local service area of a primary transmitter" is the area wherein a television broadcast station "is entitled to insist upon its signal being retransmitted by a cable system pursuant to the rules, regulations, and authorizations of the Federal Communications Commission in effect on April 15, 1976...." 17 U.S.C. §111(f). Generally known as the "must-carry" rules, these former FCC regulations still determine the characterization of a broadcast signal as local or distant for copyright purposes. Although the "must-carry" rules have been declared unconstitutional for communications purposes, they still remain viable in the compulsory license framework. Granted, the rules' invalidation has virtually eliminated the FCC's need and willingness to interpret and apply concurrent rules, such as updating the major market list. But the Copyright Office nonetheless remains bound to apply this obsolete body of cable carriage requirements in the context of the cable compulsory license.

Unfortunately, the FCC's grant of a waiver of section 73.658(m) of its rules has no connection with the must-carry rules. Because section 73.658(m) has no effect in the compulsory licensing scheme, the Copyright Office cannot recognize WTLK

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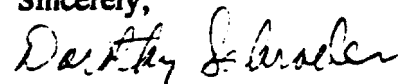
as being included in the Atlanta market on the basis of the FCC's waiver of this section.

The Office understands that waiver of section 73.658(m) is a strong indication that the Commission recognizes the practical realities of WTLK's situation and its participation in the market. The action of Arbitron also emphasizes that for its purposes, Rome is local to the Atlanta market, despite its location 56 miles away. These practical and equitable considerations, however, do not justify a finding by the Copyright Office that WTLK is local to the entire Atlanta market.

Your most persuasive argument is that WTLK is in fact received over-the-air in the Atlanta market because it places a city-grade signal over Atlanta. Unfortunately, however, even this argument fails because WTLK does not place a city-grade signal over the entire Atlanta market. In fact, WTLK does not even place a grade B signal over the entire Atlanta market.

Accordingly, the Copyright Office cannot make a determination that WTLK is local to the Atlanta market under the Copyright Act of 1976.

Sincerely,



Dorothy Schrader  
General Counsel